United States Court of Appeals

for the Second Circuit

PETITION

74-1611

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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REA EXPRESS, INC.,
Petitioner,

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, et al.,
Intervenors,

P/S

v.

CIVIL AERONAUTICS BOARD,
Respondent,

AIR FREIGHT FORWARDERS ASSOCIATION, et al.,
Intervenors.

ON PETITION FOR REVIEW
ORDERS OF THE CIVIL AERONAUTICS BOARD

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2

INDEX

INDEX CONTINUED

CITATIONS

Cases:

*Cases chiefly relied upon are marked by asterisks.

INDEX CONTINUED

INDEX CONTINUED

INDEX CONTINUED

8

3,15,20,37

5,58

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ON PETITION FOR REVIEW OF
ORDERS OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE ISSUES

1. Whether the Civil Aeronautics Board properly determined that the present air express system could not be continued and that the changes sought by REA were not in the public interest.

2. Whether the Board's finding that air express no longer possesses unique advantages and therefore is no longer irreplaceable is based on substantial record evidence.

3. Whether the Board correctly refused to postpone a decision in the Express Service Investigation case until it had first determined air express rates and divisions, the cost of the successor service and the exact form of the new High Priority Cargo Service.

4. Whether the Board was required to include labor protective provisions in its order terminating air express and awarding REA air freight forwarding authority.

STATUTES INVOLVED

The pertinent sections of the Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. 1301 et seq. are set forth as an appendix to this brief.

COUNTERSTATEMENT OF THE CASE

On May 7, 1974, REA Express Inc. (REA) petitioned this Court to review a number of orders by the Civil Aeronautics Board dealing with the Board's termination of REA's authority to provide air express service and its concomitant award to REA of air freight forwarder authority (J.A. 806).[1/] The principal order assailed is Order 73-12-36 (December 7, 1973) (J.A. 663) in the Express Service Investigation (Docket 22388) wherein the Board sets forth its decisions on the future of air express and the role of REA in the air transportation system. In that case the Board disapproved the agreements between REA and the air carriers providing for air express service on the grounds that they were no longer in the public interest; terminated REA's temporary exemption authority as the exclusive indirect air carrier for air express on the same grounds; granted REA's request for nation-wide air freight forwarder authority; and directed the air carriers to introduce a new high-priority cargo service designed for the small number of shipments requiring extra-fast shipment.

The other orders which REA would have this Court review are:

1/ Reference herein will be made to the specific Board orders and internal pagination therein as well as to the Joint Appendix (J.A.). Reference will also be made to the Transcript (Tr.) and to Exhibits (Ex.). Board Order 74-6-118, omitted in preparation of the Joint Appendix, is set forth as a Supplemental Appendix (S.A.) to this brief.

-- Order 74-5-25 (May 26, 1974) (J.A. 786), the supplemental opinion and order of the Board in the Express Service case which reaffirmed the earlier decision to terminate REA's air express authority, but granted REA's request for additional time to make the transition to air freight forwarder status;

-- Order 74-5-23 (May 6, 1974) (J.A. 774), in the Air Express Rates Investigation (Docket 22387) in which the Board declined to pass on future air express rates because of its earlier decision in the Service case terminating REA's air express authority, but did reserve for possible decision the question of readjustment of past air express revenues between the air carriers and REA;

-- Order 74-5-24 (May 6, 1974) (J.A. 783), by which the Board rejected REA's motion to consolidate the Air Express Rates Investigation into the Domestic Air Freight Rates Investigation (Docket 22859);

-- Order 74-2-118 (February 27, 1974) (J.A. 744), in which the Board authorized the air carriers to hold discussions concerning the establishment by them of the high priority, expedited cargo service the Board found necessary in the Express Service case;

-- Order 74-4-1 (April 1, 1974) (J.A. 763), by which, on reconsideration of the February order, the Board adopted certain

procedures designed to facilitate the inter-carrier discussions on high priority service;

-- Order 74-5-74 (May 14, 1974) (J.A. 813) in which the Board rejected REA's petition for reconsideration of Order 74-4-1. 2/

1. The nature of air express and its regulatory background.

Air express was the first, and for many years the exclusive means of transporting cargo by air. Air express represents a joint undertaking of the airlines and REA, pursuant to agreements negotiated between the parties which set forth their respective obligations in providing this form of air transportation. Although there have been a number of changes in those agreements over time, the essential relationship between the parties has

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2/ In terms of the number and variety of the orders challenged, this case is reminiscent of McManus v. C.A.B., 286 F.2d 414 (1961) in which this Court found most of the orders challenged to be unreviewable. Obviously, the past-divisions aspect of Order 74-5-23 in the Rates Investigation is not final. In all of its aspects, moreover, that order is relevant only insofar as it is involved in REA's claim that the Board erred in deciding the Service Investigation without first finally disposing of the Rates Investigation. Further, if the Service Investigation order should be set aside for this or any reason, the issue of what further action should be taken in the Rates Investigation is a matter for initial consideration by the Board in light of the remand. The consolidation order and those relating to airline discussions are obviously interlocutory. To be sure, REA rests an Ashbacker claim on the discussion orders and, for purposes of that argument, the question of finality depends upon the merits of the Ashbacker contention, i.e., whether those orders deprived REA of Ashbacker rights. Since, as we will show, they did not, those orders also are interlocutory and non-reviewable.

remained unchanged. The agreements have called for the air carriers to provide airport-to-airport service for a "normal" amount of air express on a priority basis. REA, in turn, provides pickup and delivery service as well as other ground and administrative services. Collectively, the parties to the agreement constitute "the carrier," with single carrier responsibility, a single uniform air express bill and a single uniform set of conditions of carriage.

With enactment of the Civil Aeronautics Act of 1938, REA's corporate predecessor, the Railway Express Agency applied to the Board for permanent certification as an air carrier. In its first examination of air express, the Board found that the Express Agency was an "indirect air carrier" and should be exempted from the certification requirements of the Act. 3/ It did not, however,

3/ See Railway Express Agency, Grandfather Certificate, 2 C.A.B. 531, 541 (1941). Section 101(3) of the Federal Aviation Act of 1958, 49 U.S.C. Section 1301(3), 72 Stat. 737 and formerly Section 1(2) of the 1938 Act provides:

> "Air carrier" means any citizen of the United States who undertakes whether directly or indirectly or by a lease or by any other arrangement, to engage in air transportation: Provided, that the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

(Footnote continued)

grant the request of the Express Agency for permanent authority to provide air express. In rejecting this first of many such requests by the Express Agency, the Board instead awarded it a temporary exemption, pending the outcome of an investigation into the agreements between the parties.

In 1943 the Board concluded the examination of the air express agreements which had been submitted by the air carriers and the Express Agency for Board approval pursuant to Section 412 of the Act. In its decision, the Board stated (Railway Express Agreements, 4 C.A.B. 157, at 158):

> "Air transportation has reached now a stage of development at which it appears clearly essential that the air lines be freed from certain of the restrictions imposed by the contracts in order that they will be in a position to move in whatever direction the public interest may require in the future in the development of cargo service. The contracts provided that the air carrier will not accept express business from any person other than Express Agency and that Express Agency will not make an arrangement with another air carrier for a similar service without meeting certain

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Footnote continued--

The Board defined an "indirect air carrier" as one who "holds out to the public that it will undertake to transport property by air, and enters into contracts with shippers wherein it binds itself to discharge such an undertaking with respect to particular shipments" Railway Express Agency, Grandfather Certificate, supra at 536. See also Consolidated Flower Shipments v. C.A.B., 213 F.2d 814 (C.A. 9, 1954); American Airlines v. C.A.B., 178 F.2d 903 (C.A. 7, 1949); Railway Express Agency v. C.A.B., 345 F.2d 445 (C.A.D.C., 1965), cert. denied, 382 U.S. 879.

> restrictive conditions. It appears to the Board that these restraints should be eliminated.

With the agreements revised in that manner, the Board found nothing to indicate that they were adverse to the public interest, and accordingly, it approved them. Again, the Board did not award the permanent operating authority to the Express Agency which would have made it the exclusive indirect air carrier for air express. Rather, its temporary exemption was continued. Shortly thereafter, the individual air carriers began offering air freight services to the public on their own.

As additional air carriers were certificated following the Second World War, the Express Agency entered into identical agreements with them. In addition to approving these new agreements as not adverse to the public interest, the Board also reissued REA's exemption authority as an indirect air carrier but stated that its order is "subject to revocation by the Board at any time if it deems that the exemption herein granted is no longer in the public interest" Order 5149, September 3, 1946. 4/

In 1948, the Board authorized a third form of air cargo, the air freight forwarder. In the Air Freight Forwarder Case, 9 C.A.B.

4/ The pertinent portion of this order may be found at Air Freight Forwarder Case, 9 C.A.B. 473, 479 (1948).

473 (1948), the Board granted exemptions as indirect air carriers to a large number of applicants who sought air freight forwarding authority in order to provide this new air cargo service. 5/ In this important decision, the Board also considered whether "the public interest requires the continuation, limitation, modification, or revocation of the temporary order of exemption under which REA has been operating its air express business since March 13, 1941, and specifically including an inquiry as to the extent to which there is or may be a general need for air freight forwarder, air cargo forwarder, air express forwarder, or other similar indirect air carrier services," Air Freight Forwarder Case, supra at 476.

The Board determined at that time "that the air express service now being performed by REA meets a public need and that the public interest requires the continuance of such air express service," Id. at 483. In doing so, the Board emphasized the flexible authority it held through the use of its exemption power. It stated (Id. at 489):

5/ An "Air Freight Forwarder" is "any indirect air carrier which, in the ordinary and usual course of its undertaking, assembles and consolidates or provides for assembling and consolidating such property or performs or provides for the performance of break-bulk and distributing operations with respect to consolidated shipments, and is responsible for the transportation of property from the point of receipt to point of destination and utilizes for the whole or any part of such transportation the services of a direct air carrier" 14 C.F.R. 296.2.

> "We will therefore continue REA's authorization to engage as an indirect air carrier in the transportation of property by air under the exemption provisions of section 1(2) of the Act which will enable REA to carry on its air express operations until such time as the Board may determine that such operations are no longer in the public interest."
> (emphasis added).

However, the Board did direct REA and the air carriers to renegotiate a new air express agreement which would serve the parties and the public interest more adequately. Furthermore, the Board denied for the time being action on REA's application to obtain air freight forwarder authority in addition to its renewed authorization for air express service. This request for such dual authorization was the first of a number of attempts by REA to enter the freight forwarding business while continuing in the express business, attempts which the Board rejected. 6/

In a 1955 proceeding to consider renewing the operating authority of air freight forwarders, the Board again addressed the public interest considerations surrounding continuance of air express service. It concluded (Airfreight Forwarder Investigation, 21 C.A.B. 536 at 630 (1955):

6/ In addition to the case cited in the text, see also Railway Express, Air Freight Forwarder Application, 27 C.A.B. 500 (1958); National Air Freight Forwarding Corp. v. C.A.B., 197 F.2d 382 (C.A.D.C. 1952); and Railway Express Agency, Inc. v. C.A.B., 345 F.2d 445 (C.A.D.C. 1965), cert. denied, 382 U.S. 879.

> "Whatever may be said in principle about the propriety from an antitrust standpoint of an arrangement in which all the railroads join with all the direct air carriers to monopolize the air express field, the fact remains that at the present time there is no substitute for the REA operation (Emphasis added).

Throughout this period, the basic contractual arrangements between the air carriers and the Express Agency remained the same, save for adjustments in the original formula calling for division of revenue after covering all of REA's expenses. 7/ However, by 1959 the air carriers were so sufficiently dissatisfied with REA's inability to control its costs that they entered into a separate agreement among themselves to deal collectively with air express and the Express Agency, and to end the "cost-plus" aspect of the contracts. 8/ The new agreement executed in July, 1959 with the Express Agency reflected those air carriers concerns, for it provided for a 50-50 division of revenues after deduction of only certain Express Agency expenses. It also called for a new agency tariff with each of the airlines and the Express Agency participating as carriers. When this five-year agreement expired in 1964,

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7/ See pp. 22-27 of Initial Decision by the Administrative Law Judge in the Express Service case for a complete recitation of the various adjustments in the agreements during this period (J.A. 593-9).

8/ Agreement CAB 12866 establishes the Air Express Negotiating Committee, composed of five representatives from the carriers to deal with REA and also establishes the Express Committee which consists of one representative from each carrier and serves to advise the Negotiating Committee.

a new five-year contract was agreed to by all the parties. This last agreement [9/] was to have expired on June 30, 1969.

However, the nation's railroads sold their controlling stock in the Express Agency in early 1969 and negotiations over a new agreement were delayed until REA's new management familiarized itself with the company's operations. Although the agreement was extended to October 3, 1969, no progress was made once negotiations began. A second extension until April 30, 1970 was agreed to in conjunction with a concession by the air carriers to provide $3 million in financial assistance to REA. Further negotiations continued to prove fruitless and a third extension to June 30, 1970 was obtained. A final one-month extension to July 31, 1970 and a revision of the agreement, conditionally based upon approval of a new tariff, were negotiated in June 1970 and filed with the Board.

The proposal involved, among other things, an increase in REA's minimum charge per shipment of 42 percent over the charge in effect approximately the two months before. It also involved increases of as much as 85 percent in general commodity rates over existing levels for small shipments moving less than 250 miles, an increase which, in turn, was 138 percent above the same rates in effect two months earlier. [10/]

9/ Agreement CAB 17935.

10/ Conversely, the general commodity rates for larger shipments and longer hauls would have been reduced by as much as 24 percent.

Finding insufficient justification for the proposed rate changes, the Board suspended the tariffs and instituted the Investigation of Air Express Rates, Docket 22378 (Order 70-7-109, J.A. 174). At the same, the Board instituted the Air Express Service Investigation, Docket 22388 (Order 70-7-110, J.A. 181). As the Board stated, the purpose of the Service Investigation was threefold: (1) to pass upon the new agreement submitted by the parties pursuant to the Board's duty under Section 412(b) of the Act, 49 U.S.C. §1382(b); (2) to respond to the Petition and Complaint filed by REA three months earlier seeking Board intervention in the stalemated negotiations; and (3) to again explore the role of REA Express in the national air transportation network, last done in 1955. 11/ It is the Board's disposition of these two proceedings which is at the root of this review proceeding.

11/ Several months earlier, when REA and the carriers had failed to reach a new agreement after two extensions of the old one, REA had filed a "petition and complaint" with the Board seeking Board intervention in the hope of breaking the deadlocked talks. It there stated:

> ". . . the future of air express as a vital public service requires the establishment of these major principles in a new air express agreement:

(Footnote continued)

Once the Board had suspended the new tariffs, the revised agreement collapsed and REA refused to extend the existing agreement any further. At this point, several shipper groups successfully sought to enjoin REA and the airlines from terminating air express services. On August 12, 1970, the United States Court for the District of Columbia ordered the parties to continue air express operations pending final orders by the Board in the Express Service Investigation and the Investigation of Air Express Rates. Shortly thereafter, the parties stipulated to an interim extension scheduled to expire 60 days after the date of final orders in both cases, and on the basis of that agreement, obtained a dismissal of the outstanding preliminary injunction.

Footnote continued--

1. The amount which REA pays the airlines should be fairly related to what other airline customers pay for air transportation.
2. REA should have the independent right, subject to Board approval, to develop and revise tariffs for Air Express service free from the power of veto which the air carriers now have. The Air Express Agreement and the tariff developed thereunder should not, as has been the case in the past, preclude Air Express customers from using the service for the long-haul market and for a broader range of shipments.
3. The agreement should be permanent and provide for arbitration in the event that negotiations are unable to resolve disputes.

The relief requested by REA at the time included a Board ruling that the "future Air Express Agreement shall be permanent" and must contain provisions reflecting the "major principles" set forth in the foregoing quotation.

Thus, since 1969, the parties have been unable to reach any accord on the substantive aspects of a new agreement. As set forth in the Board's order in the Service Investigation, [12/] REA has insisted upon a drastic re-structuring of the basic air express relationship. During the past five years of unproductive substantive negotiations with the air carriers over a new post-1969 agreement, REA has demanded not only independent authority to set rates for air express, free from veto by the air carriers, but also designation of it as the exclusive and permanent indirect air carrier for air express.

Just as REA has steadfastly maintained that same position in proceedings before the Board, so too, the air carriers have been adamant in their opposition to these proposals before the Board.

2. Proceedings involved in this litigation.

a. Initial decision in the Service Investigation

Throughout the course of the Service Investigation, REA repeated the position it had taken earlier in negotiating with the air carriers that in order to remain alive, REA needed independent rate-making authority free from veto by the air carriers, and dual authority to operate both as the exclusive indirect air carrier for air express and as an air freight forwarder.

12/ See Order 73-12-36, pp. 26-30, J.A. 689-693.

In his initial decision, the Administrative Law Judge (ALJ) gave REA none of the relief it had sought. With regard to the request for independent rate-making authority, the ALJ identified that as a part of the continuing conflict between REA and the air carriers. Stating "it is not the purpose of this proceeding to settle the difference between the parties as to the terms of their future relationship" (I.D. 58, J.A. 629), the ALJ left the independent rate-making question undecided, to be resolved by the negotiations of the parties.

The ALJ then rejected REA's application for air freight forwarding authority as not in the public interest, although "it appears to be capable of performing the proposed air transportation." (I.D. 61, J.A. 632). He believed that dual air express/air freight forwarding authority would give REA an unfair advantage over other forwarders, and in any event, the air carriers "well-justified" opposition to such dual authority would doom the agreements providing for air express (I.D. 63, J.A. 634). Finally, the ALJ refused REA's request for permanent operating authority on the grounds that its "touch-and-go financial condition dictates rejection of the proposed monopoly at this time" (I.D. 64, J.A. 635). However the ALJ did find that the existing concept of air express was in the public interest and should be maintained. In reaching this determination, he identified the transportation characteristics which he considered distinguished air express from the other

services and gave it "a special utility" unmatched by the air freight forwarders and direct air carriers (I.D. 51, J.A. 622). At the outset, however, he observed that "both the air carriers and the air freight forwarders readily perform pickup and delivery service * * *" (I.D. 31, J.A. 602). 13/ On the matter of the priority space provisions provided air express by the air carriers, the ALJ stated: "[S]ince the load factors of the air carriers have been generally low in recent years, the airlift priority accorded air express has not been its most significant feature" (I.D. 32, J.A. 603), and that "a small percentage of air express shipments has received more expedited handling" (I.D. 48, J.A. 619). Thus, "the priority factor is 'an insurance policy' that a shipment will be loaded on the first available flight" (I.D. 49, J.A. 620).

The ALJ also identified single carrier responsibility and single carrier documentation as characteristic air express attributes (I.D. 33, J.A. 604). Although he was unsure of exactly how many communities and cities were then served by REA, 14/

13/ On a factual matter so elemental, REA's brief (p. 8,) is seriously distorted by implying that only air express offers pickup and delivery service. In addition the record shows that more than 20% of all air express shipments were airport-to-airport shipments. Order 74-5-25, p. 10, J.A. 795.

14/ He noted that within the preceding year, REA had closed 510 of its approximately 2,800 offices or other locations maintained by exclusive agents, joint agents, merchant agents or branch package agents (Tr. 706).

he stated: "it is apparent that they far exceed the number of cities and towns covered by the single carrier door-to-door services of any air freight forwarder" (I.D. 35, J.A. 606). The ALJ also identified REA's wide commodity coverage which ranges from live animals to currency to firearms as a vital aspect of air express (I.D. 37-38, J.A. 608-9). And, on the matter of the relative speed of air express, the ALJ expressed his dissatisfaction with the reliability of the surveys undertaken but stated that "in a rough sense they reasonably may be read as showing that the bulk of the shipments of all three services [air express, air cargo and air freight forwarding] are delivered within 48 hours of origination, and, that, with the possible exception of Emery Air Freight, air express has a higher percentage of shipments delivered within 24 hours" (I.D. 48, J.A. 619). Finally, the ALJ also stated, "a component of air express particularly vital to many shippers is the reasonable rate structure with respect to small shipments" (I.D. 50, J.A. 621).

Having identified those aspects of air express service he believed unique, the ALJ then proceeded to discuss the proposal that the present air express system be abolished and REA awarded air freight forwarding authority. He stated (I.D. 52, J.A. 623): "There is much to commend this idea, since, on its face, a number of the benefits and advantages of air express would appear

to be retained, and the uncertainty attending reocurring negotiations would be eliminated." However, he also stated that "* * * shippers would be faced with substantially higher costs for small shipments, and shippers in the small airport cities would be left with only the air freight service of the direct air carriers" (I.D. 53, J.A. 624). The ALJ also believed that both the local service air carriers and the trunk air carriers would be adversely affected by the abolition of the present air express system (I.D. 55, J.A. 626).

b. The Board's decision in the Service Investigation.

In review proceedings before the Board, REA again took the position that it needed additional independent rate-making authority as well as dual air express/air freight forwarding authority to stay alive. It criticized the ALJ's initial decision, stating that it had given REA no more than that which REA already had, and claimed that was not enough. 15/

15/ REA's counsel argued to the Board (Oral Argument, Tr. 19-20, J.A. 2024-5):

> "I find it very hard to believe that even if the Examiner's decision in the rate case were to be modified by the Board in a way that REA would regard as a more appropriate calculation of airline costs, I find it very hard to believe that it would be possible for REA to continue its present operations if it obtains nothing further from this case than what it already has, which is essentially what Examiner Keith has given us. He has left the parties where they are * * * Under those circumstances, REA's evidence in this case indicates that it will have no choice but to play the game much more the way a forwarder does in terms of the scope of markets served and the scope of commodities carried" (emphasis added).

In its decision, the Board acknowledged REA's plight as depicted by it (Order 73-12-36, p. 2; J.A. 665). It shared REA's concern for the company's acute financial distress, 16/

> "The crux of the matter is that REA must increase its traffic volume substantially, either by somehow increasing its air express traffic, or by carrying traffic under other authority in addition to its air express business. REA agrees and is here seeking expanded authority" (Id., p. 25, J.A. 688).

The Board addressed the two crucial REA demands for additional authority and stated why it could not meet those demands. It noted that REA's proposal for independent rate authority is opposed by its partner in the air express agreement, the participating air carriers

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16/ REA's surface traffic declined from 47 million shipments in 1967 to 15 million shipments only three years later (Order 73-12-36, p. 11, J.A. 674). Air express traffic has shown only a 3% increase from 1966 to 1970, in comparison with a 168% increase during the same period for air freight forwarding shipments (id. p. 12, J.A. 675). REA's last profitable year was 1965 when it earned about $1,000,000. Since then (through 1972), it has lost about $68,000,000. In 1970, its net worth was minus $26,000,000. It has survived only by selling off capital assets, now virtually exhausted, smounting to $48,000,000 (id., J.A. 675).

Moreover, as the Board later observed in denying REA's motion for a stay (Order 74-6-118, pp. 2-3, S.A. 2-3), things have not gotten any better for REA. It lost $8,500,000 in 1973; the first quarter of 1974 reflects the same pattern. Air express shipments in April 1974 declined 16%. Furthermore, while supporting REA's motion for a stay, the participating air carriers specifically reserved the right to immediately terminate the interim agreement if REA should default in any of its payments to the air carriers.

(id., p. 27, J.A. 690). If, nevertheless, such authority were granted, grave regulatory problems would result because of REA's inability to provide the requisite economic data. Furthermore, the Board found that such independent authority would result in a deterioration of air express service to the small community, small package markets it now serves, and would operate to impair the service of air freight forwarders in the larger markets for heavy shipments (id., pp. 29-30, J.A. 692-3).

The Board also expanded upon the reasoning of the ALJ in denying REA dual authority to provide both air express and air freight forwarding services. It found:

> "With dual authority, REA could offer a full range of rapid delivery services -- including 'priority' services -- that could not be matched by any other forwarder. If this helped REA to dominate the entire indirect carrier industry, as it might, it would inevitably lessen competition among existing forwarders and, perhaps, sap the vitality of that group. Of course, that would thwart this agency's primary goal in licensing REA and the forwarders -- namely, to promote the vigorous development of air freight." (id., p. 31; J.A. 694).

Dual authority would also reduce the cross-subsidization which not restrains for air express in low density, small community markets (id., J.A. 694). But in any event, the Board returned to the ALJ's determination that dual authority could not be authorized because the participating air carriers would terminate the air express agreement in that situation.

Thus, the Board concluded that the additional authority sought by REA was not in the public interest, and would not be awarded to REA ". . . unless the chance that it could thereby continue its separate express service is so vital that it outweighs all other considerations" (id., p. 6; J.A. 669). That, however, is not the case. Continuation of the present air express system is not required, the Board found, because the evidence demonstrates that the unique advantages which the once-irreplaceable service provided have withered away (id., J.A. 669).

While candidly acknowledging that its decision marked a change from the 1948 conclusion that "the public interest requires the continuance of [REA's] air express service," 17/ the Board stated it "no longer has the option to continue express service in the format contemplated in 1948, and consequently, cannot reach the same conclusion" (id., p. 7; J.A. 670). The Board stated that: "The weight of the evidence of record establishes that air express is not unique in providing expeditious service to the public; other forms of air freight provides service that is as fast, or faster than, regular express service" (id., p. 14; J.A. 677). Additionally, the priority treatment accorded to air express under the agreements was found by the Board to rarely

17/ Air Freight Forwarder Case, 9 C.A.B. 473, 481 (1948).

have any impact since only 1.7% of all flights surveyed departed without sufficient space to accommodate the tendered cargo (id., p. 16, J.A. 679).

With regard to geographic coverage and REA's market concentration, the Board found that 6 cities produced 56% of its total air express shipments and that 87.4% of REA's gross origin and destination ("O&D") revenues come from only 6.5% of the thousands of offices it claims to have. 18/ (id., p. 17, J.A. 680). Thus, the bulk of its service is co-extensive with that of the air freight forwarders. Further, the Board found that if air express was terminated, the record provided sufficient evidence that many if not all gaps would be filled by expansion of forwarder services (id., J.A. 680). But in any event, the Board accepted REA's statements that, absent new authority, (which the Board denied) it would have to reduce both geographic and commodity coverage in order to survive. Thus, the Board concluded, "REA's historic broad geographic coverage is clearly a relic of the past" (id., pp. 19-20, J.A. 682-3).

Similarly, the Board found REA's commodity coverage to the unexceptional, noting that

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18/ The Board thus rejected the statement by the ALJ, which REA relies upon in its brief (p. 13), that only 18% of total Air Express shipments are generated in the top 100 markets, and the balance in smaller markets.

> "REA presently carries only about 18 more items than do the airlines and the larger forwarders. Moreover not even these few commodities will lose service as a result of the ending of air express. REA, as an air freight forwarder, will be fully authorized to continue to handle all of the commodities, and provide all of the services, it presently offers. In any event the record shows that even were REA to turn away from such business, it would be handled by the direct air carriers and other air freight forwarders." (Id., 20, J.A. 683).

Contrary to REA's bald assertion (Br. 3) that the Board never considered the critical economic function of air express, the order reveals that the Board did, in fact, confront the cost issue. "[T]he Board is aware that this service offers the lowest nongovernmental rates to many small-package shippers. This would be compelling reason to continue air express if that were possible" (id., p. 7, J.A. 670). But the Board concluded (id., p. 23, J.A. 686):

> "[B]ased upon the record in this proceeding and many years of experience with the present arrangement, we are convinced that the basic realities of the situation offer no practicable way of retaining the present air express arrangement."

Thus, having found that air express is no longer the unique service it once was, and having determined that it could not grant to REA those items it identified as essential for survival, the Board concluded that the present system must be changed. Accordingly, the Board terminated its approvals of the air express agreements, withdrew REA's air express exemption authority and concomitantly

authorized REA to conduct air freight forwarding operations. Speaking of this last action, the Board stated (id., pp. 34-34, J.A. 697-8):

> "But its reformation into an air freight forwarder will have numerous advantages for it, as its management recognized. It will be able to limit its business to the kinds of traffic, in the areas of the country, it can deal with most effectively. Its rate policies will no longer have to take into account airline partners whose interests vary so greatly from REA's. And the size, identity, and breadth of coverage it developed as the airlines' ground agent should stand it in good stead in its efforts to compete with other forwarders on equal terms."

To permit REA, shippers and other elements of the air cargo industry time to plan for the adjustment, the Board delayed the effectiveness of its order by six months.

Finally, the Board concluded that a very limited number of commodities require a high-priority, next-flight-out transportation service, on strictly an airport-to-airport basis. Therefore, it directed the air carriers, as part of their duty to provide reasonable transportation, to initiate a high-priority, airport-to-airport service (id., 38, J.A. 701).

In its petition to the Board for reconsideration, REA requested, inter alia, more than six months to make the transformation to air freight forwarder and dual authority during the

transition period. In its Supplemental Opinion and Order (Order 74-5-25, May 6, 1974, J.A. 786), the Board granted REA's request for additional time until August 1, 1974 to accomplish the transition but denied it dual authority during that interim period (Order 74-5-25, p. 2, J.A. 787). The Board also reiterated its earlier determinations with regard to priority right of air express, geographic and commodity coverage, relative rate levels of air express and air freight and the viability of air express.

c. Proceedings in the Rates Investigation.

On the same day that it issued its Supplemental Opinion and Order in the Service Investigation, the Board issued its order (Order 74-5-23, J.A. 774) in the Investigation of Air Express (Docket 22387).

In the initial decision in that case, the ALJ had rejected outright REA's claim for readjustment of past revenue divisions amounting to $31 million. Rather, he found that REA owed money to the airlines on this issue, but because the airlines had taken the position that the Board was without legal authority to make a retroactive adjustment, they did not make a claim for the overpayment (I.D. Rates, p. 87, J.A. 484).

Additionally, the ALJ had attempted to investigate such aspects of air express rates as the actual cost of REA's pickup and delivery service, terminal service cost, rate of return, the airlines allocation of costs by space or weight and others. He concluded that the interim and suspended tariff rates under investigation were not reasonably related to the costs of the service and therefore were unjust, unreasonable and unlawful (id., p. 68, J.A. 465). In prescribing a lawful rate, the ALJ "pegged [it] to fully allocated costs" (id., p. 73, J.A. 470). He established a structure based on a minimum charge of $8.22 for shipments under five pounds moving at distances up to two hundred miles (id., J.A. 470). As for future divisions of rates, the ALJ rejected REA's formula, stating "[t]he evidence clearly supports the finding that just and reasonable air express divisions are reasonably related to costs" (id., 79, J.A. 476). Although he prescribed just, equitable and reasonable divisions, the ALJ stated that those divisions were subject to negotiation by REA and the air carriers within a defined zone of reasonableness (id., 84-85, J.A. 482-3).

On review, in its Rates decision (Order 74-5-23, J.A. 774), the Board stated that its intervening decision in the Service case effectively mooted any question of prospective air express rates since REA was soon to become an air freight forwarder (id., 1,

J.A. 774). With regard to REA's claim for a retroactive adjustment of past revenue divisions, the Board declared that "there are major gaps in the data necessary to an informed judgment as to what the just, reasonable, and equitable divisions would be, and that we have serious doubts with respect to the jurisdiction question which were not resolved by the parties presentations" (id., p. 2, J.A. 775). While commending the ALJ for making the best of a "prickly and elusive challenge" (id., p. 5, J.A. 778), the Board placed the onus squarely on REA for failing to provide the meaningful economic data necessary for a Board determination of the matter (id., J.A. 778). Therefore, it directed the parties to meet in an informal conference to attempt to resolve the matter on their own. If unsuccessful, further briefs would be received by the Board (id., p. 9, J.A. 782).

d. Other related Board proceedings.

With respect to the high-priority service which, in the Service Investigation, the Board directed the air carriers to initiate, the Board authorized discussions among the certificated air carriers to establish provisions for the inter-airline coordination this new service would require (Order 74-2-118, February 27, 1974, J.A. 744). By subsequent order on petition for limited reconsideration by the air carriers, the Board established procedures for such discussions that would permit the

attendance of only representatives of the participating air carriers. 19/ On REA's petition for reconsideration of this order, the Board repeated earlier statements that no due process of law violation arose from REA's inability to attend and participate, and that the discussions only involve a new type of service the air carriers are obligated to provide (Order 74-5-74, May 14, 1974, J.A. 813 ; see also Order 74-2-118, p. 3, J.A. 746).

e. REA's motion for a stay of Board orders.

On May 24, 1974, REA filed with the Board a motion to stay the effectiveness of its orders in the Service and Rates investigation. In addition to claiming that it would be irreparably injured if it had to become an air freight forwarder, REA's motion also raised a number of legal arguments to support its contention that the company had a substantial likelihood of success in the judicial review by this Court of the Board's orders.

The Board found REA's arguments unpersuasive and rejected them in denying the motion for a stay. With respect to REA's claim of irreparable injury, it noted that REA had long sought air freight forwarding authority and that it had not produced "hard evidence" of its inability to achieve the change-over beyond

19/ Of course, a Board representative as well as those from the Departments of Transportation and Justice would be present at all meetings, minutes of the meetings would be filed with the Board and any agreements reached by the parties would be subject to Board approval under Section 412 of the Federal Aviation Act, 49 U.S.C. 1382.

general references to its ongoing financial difficulties (Order 74-6-118, p. 2; S.A. 2). Furthermore, the Board concluded that however bleak its financial prospects are, "there is considerable greater evidence that REA faces an imminent end if it does not change" (id., S.A. 2).

With regard to the continued viability of the air express agreement itself, the Board made two observations. First, it found that although some air carriers supported REA's motion for a stay, they expressly conditioned that support upon the right to ". . . terminate air express service forthwith in the event REA should default in any payment due the airlines thereunder." (id., p. 3, S.A. 3). Second, the Board recognized that a number of the air carriers had repudiated the air express agreement, thereby precluding some shipments from moving by air express (but not air cargo) in the cities served exclusively by those airlines. 20/

The Board rejected REA's claim that it could not terminate air express until a substitute had been effected by stating that such action was not in the public interest, and specifically would benefit neither REA nor shoppers seeking dependable and adequate service. REA's Ashbacker argument was found equally lacking in merit. 21/ REA contended that the Ashbacker principle had been

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20/ We discuss the withdrawal by the airlines from the agreement, and the resultant impact more fully in the Argument, infra, p. 45.

21/ Ashbacker Radio Co. v. F.C.C., 326 U.S. 327 (1945).

violated when the Board failed to give comparative consideration to the current air express system and the new high-priority cargo service which the Board had directed the airlines to initiate. Additionally, REA claimed that it was improperly excluded from the air carrier discussions authorized by the Board to plan certain aspects of the new service.

The Board responded to these contentions by stating that REA had been afforded every procedural right during the Investigation and that it had been given a full opportunity to present its case. In essence, the Board found REA's claim of error to be not that it was denied a comparative hearing, but rather that after the hearing REA's proposal was not adopted by the Board (id., p. 6, S.A. 6). Furthermore, the Board stated that the airline discussions mentioned by REA have nothing to do with Ashbacker since the Board envisioned the high priority service as a new service, designed to offer the extra-fast treatment as one had previously provided, including air express (id., S.A. 6).

Additionally, the Board rejected REA's contention that it should have postponed a decision in the Service case until all issues in the Rates case were finally resolved. Again returning to low air express rates which operate to favor continuation of the

present regime, the Board reiterated its earlier conclusion that, even if an adequate record had existed to permit the Board to make an informed judgment in the Rates case, a decision favorable to REA on rates or divisions would not be enough to save the air express system (id., p. 7, S.A. 7). Because the facts are clear and not seriously in dispute that the present air express system cannot continue, the Board found some break with the past and change was ineviable. To that extent, prediction of future service becomes unavoidable, the Board concluded. Therefore, the Board dismissed REA's charge that it was impermissibly relying on "speculation" and rejected "REA's thesis that we are legally precluded from acting on our judgment of what the future is likely to bring." (id., p. 7, S.A. 7).

ARGUMENT

I

CONTRARY TO REA'S ASSERTIONS, THE BOARD's ACTION IS FIRMLY GROUNDED UPON ITS DUTIES UNDER THE FEDERAL AVIATION ACT OF 1958

REA and the intervenors which support it attempt to portray a situation in which the Board has failed to observe its responsibilities to REA and the public, both by arbitrarily decreeing the demise of air express and in decreeing that demise prior to providing services in substitution for air express. In so contending, these parties simply do not face up to the Board's determinations: (1) that air express no longer represents a unique or essential service; (2) that REA is in extremis and cannot be strengthened or preserved by the Board in any manner which is consistent with the public interest; and (3) that the present air express arrangement stands in the way of superior service which can and undoubtedly will be provided when the present arrangements are terminated.

REA also disregards the fact that the Board has not removed it from the air transportation arena. Rather, the Board has provided it with domestic air freight forwarder authority under which it may continue to participate fully in the transportation of cargo by air. REA may utilize its existing experience as an international air freight forwarder in those operations, and its existing domestic facilities and experience in handling air cargo. If REA cannot survive in its new role, the fault will not lie with the Board.

Indeed, one of REA's principal contentions is that the Board erred in accepting REA's contention that it could not continue viable operations unless it was accorded the exclusive right to provide air express primarily on its own terms; and that in addition, to survive, it required authorization to provide service as a domestic air freight forwarder. At the Service hearings, Tom Kole, President of REA made the following statement:

> "If we are to be financially able to pursue this policy, however, the context in which REA's operations are conducted must be modified in the ways I have described. Specifically, REA needs:
>
> 1. A grant of Air Express authority to REA in a form which will eliminate our dependence on the Air Express Agreement * * *.
> 2. A grant of air freight forwarding authority to REA" (Ex. REA-t-1, p. 13).

President Kole also stated:

> "I think that if the air express agreement had the changes in it which we have requested, it would be the very best way to go. * * * Short of those kinds of changes, then I think we would be better off as an air freight forwarder" (Tr. 920, J.A. 1841).

Characterizing this position as its "adversary" or litigating one, REA says in effect that the Board should have recognized that it was quite naturally seeking and arguing for the result most favorable to it and that the Board should not have taken the REA position at its face value. We question REA's assumption that it is entitled to urge a particular position to the Board and thereafter to assert legal error

when that position is accepted.[22/] In any event, the Board certainly cannot be faulted for independently reaching conclusions which accorded with REA's own presumably expert testimony concerning its financial position and its need for strengthening.

Moreover, we find no suggestion in the cases cited by REA of any duty on the part of the Board to strengthen REA in ways in which the Board found would be adverse to the public interest or of any relevant factor which the Board overlooked in its determination in this case. Certainly, Northeast Airlines, Inc. v. C.A.B., 331 F.2d 579 (C.A. 1, 1964) does not establish that the Board was obligated "to revive rather than execute a financially troubled carrier" (Br., p. 27) or that the Board was required to place REA's survival ahead of all other statutory goals. There, the Court reversed the Board's refusal to renew Northeast's certificate for the New York-Miami market. The Board had found that there was not only no need for a third carrier (Northeast) but also that the carrier's financial position adversely affected its fitness to perform that service. The Court held that the unsuccessful nature of Northeast's operations and its lack of success in the future were irrelevant in a proceeding which the court deemed to be confined to the need for a third carrier in the market. The court remanded the matter to the Board for a clearer statement of its reasoning and an explicit statement of the

22/ See, e.g., Callanan Road Co. v. United States, 345 U.S. 507, 513 (1953): A litigant "cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval."

various issues which it had decided.[23] Here, there is no confusion over the issues involved or disagreement between REA and the Board that the present air express system must be changed if REA is to survive as an air express carrier.

Similarly, we fail to perceive how REA's case has advanced by its reliance upon Shaffer Transportation Co. v. United States, 355 U.S. 83 (1957). In Shaffer, the court held that the ICC could not deny a motor carrier's application to provide service between two points being served exclusively by rail merely on grounds that the present service was adequate. Rather, it was required to consider the inherent advantages (there, the lower rates based on less expensive operations) possessed by one mode of transportation over another. Here, of course, the issue is not intermodal competition but rather a question of whether the exclusive air express authority held by a failing indirect air carrier should be replaced by another form of indirect carrier authority very similar to the air express one.[24]

23/ The decision in the Northeast case obviously cannot stand for the proposition that the Board may not take into account a particular carrier's financial status in determining whether there is a need for service by that carrier. As the Board stated in the Northeast case on remand, (41 C.A.B. 404, 407): "In other words, the principal issue in a proceeding such as this is not simply whether there is a service need, but whether, apart from service need, there is a 'need' for operation by a particular carrier in terms of the other elements of the public interest embodied in the broad convenience and necessity standard."

24/ Equally unavailing is REA's reference to Trailways of New England v. C.A.B., 412 F.2d 926 (C.A. 1, 1969) which deals with consideration, again, of intermodal cost competition as an aspect of the Board's

(Footnote continued)

We recognize that the conclusion reached in this case concerning the appropriate role of REA is different from the conclusions reached in early examinations of this matter (See, p. 38, fn. 25, infra). But, as the Board stated in comparing the conclusion here with that reached in the 1948 Air Freight Forwarder Case (Order 73-12-36, p. 7; J.A. 670):

> Standing then at the beginning of a new era, the Board could not know that twenty-five years hence REA would be nearly destitute, that newly authorized forwarders would be offering fast, comprehensive service, that REA would be unwilling to continue nationwide express service except with drastically expanded authority, and that the likelihood would be low that REA could continue its existing service even were that new authority to be granted. As a result of these developments, the Board * * * cannot reach the same conclusion.

Thus, in applying the same public interest factors, the Board has found that different circumstances call for a different conclusion, a matter within its competence. See, Southern Airways, et al. v. C.A.B., ___ F.2d ___ (No. 73-1375, C.A.D.C., decided May 24, 1974, not yet reported).

Furthermore, to the extent that the different conclusion here reached may be regarded as a reversal of agency policy (we do not believe it can be so regarded), the Board's decision is well-reasoned,

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Footnote continued--

wholly unrelated ratemaking function. Moreover, there is no basis for REA's reliance upon Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973). That case examined the validity of a spearate, additional charge for a service that previously had been provided for under line-haul rates.

amply supported and fully explicated. No more is required for a change in policy. ABC Air Freight Company, Inc. v. C.A.B., 391 F.2d 295 (C.A. 2, 1968).

In the final analysis, the touchstone for the Board's action in this case, as in all others, is the public interest.[25/] An examination of the Board's orders will disclose that the Board was faithful to that standard and that it assessed all relevant factors in reaching its determination. Despite the contentions to the contrary, this case, we believe, is a rather simple one involving no real issues other than the ones of whether the Board's determinations were reasonable and supported by the evidence of record. We subsequently show, point by point, that they were.

25/ Both sec. 101(3) and 412(b) speak in terms of the public interest. Under section 101(3), the Board may exempt air carriers not directly engaged in air transportation from the certification requirements of the Act if such exemption is in the public interest. Similarly, under section 412(b) the Board shall disapprove any agreement affecting air transportation submitted to it by an air carrier if that agreement is found to be adverse to the public interest. Thus, in 1948, REA's exemption was renewed " . . . until such time as the Board may determine that such operations are no longer in the public interest" (supra, p. 9). In 1955, the Board found that " . . . at the present time, there is no substitute for the REA operation" (supra, p.11). See, Railway Express Agency, Grandfather Certificate, 2 C.A.B. 531 (1941); Railway Express Agreements, 4 C.A.B. 157 (1943); Air Freight Forwarder Case, 9 C.A.B. 473 (1948); Air Freight Forwarder Investigation, 21 C.A.B. 536 (1955); Railway Express, Air Freight Forwarder Application, 27 C.A.B. 500 (1958).

II

THE BOARD'S FINDINGS THAT REA WAS IN EXTREMIS AND NO LONGER PROVIDES A UNIQUE AND IRREPLACEABLE SERVICE ARE FULLY SATISFIED BY THE EVIDENCE OF RECORD

That REA was (and is) in desperate financial condition is obvious, and REA does not contend otherwise.[26] Rather, its argument is that the Board erred in failing to take the steps suggested by REA for preserving and strengthening it. The Board was of the view, however, that the steps suggested by REA "simply would not work" (Order 73-12-36, p. 25; J.A. 688) and that such hope for REA's survival as there might be lay in its authorization as an air freight forwarder.[27] Furthermore, even assuming that REA's proposed solution might "work," the Board found, for reasons to which we will come later, that the proposal would not be in the public interest unless "separate express service is so vital that it outweighs all other considerations" (id., at p. 6; J.A. 669). The Board concluded that it was not.

In making its finding that air express service is no longer unique and irreplaceable, the Board concluded that many of the

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26/ See note 16, supra, p. 20.

27/ REA's own President reached the same conclusion, as pointed out earlier in our brief (supra, p. 34) when he stated:

> "I think that if the air express agreement had the changes in it which we have requested, it would be the very best way to go. * * * Short of those kinds of changes, then I think we would be better off as an air freight forwarder" (Tr. 920, J.A. 1841).

advantages which that service once possessed no longer exist, and that other qualities once unique to air express are likely to disappear in light of REA's current conditions. Moreover, the Board's view was that many of the benefits of REA's services can now be supplied by the airlines or by the air freight forwarders, including REA in its new status. We shall now examine these "original sterling features" [28/] of air express to demonstrate that the Board's opinion is solidly grounded in record evidence.

The first attributes of air express examined by the Board were speed and the priority treatment accorded air express by the air carriers. The Board stated (Order 73-12-36, p. 14, J.A. 677):

> "The weight of the evidence of record establishes that air express is not unique in providing expeditious service to the public that is as fast, or faster than, regular service."

Specifically, both air freight forwarders and air express provide for shipments to be picked up and placed aboard aircraft the same day, and to be delivered at the destination the "next day," [28/] when permitted by airline schedules; otherwise delivery on the second day.

27/ Order 73-12-36, p. 33; J.A. 696.

28/ A shipment that is delivered within 48 hours of the time that it is picked up is considered to be "next day delivery" within the industry.

Using the elapsed time surveys of the parties,[29] the Board found that the majority of both air express and air freight shipments received next-day service, and virtually all received second-day service.[30] Indeed, REA's own survey establishes that it and Emery Air Freight (a forwarder) achieved the same first-day performance (45.8%) and that Emery's second-day service (92.3%) surpassed that of REA (87.5%)[31] (Order 73-12-36; p. 15, J.A. 678).

Similarly, the Board found that REA's much-vaunted space priority treatment[32] for air express rarely has any impact. Using another study relied upon by the ALJ, the Board concluded that "only one out of every 58 [flights surveyed] (1.7%) departed without sufficient space to accommodate the cargo tendered for the flight" (Order 73-12-36, p. 16, J.A. 679). Thus, although priority treatment may have been a valuable asset in 1948 when each aircraft had a cargo capacity of only 85 to 459 cubic feet,[33] "the problem

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29/ The Board shared the ALJ's dissatisfaction with these surveys, but accepted them, as the ALJ stated because "they do offer a rough comparison of the three modes of service" (Initial Express Decision, p. 39, J.A. 610).

30/ The surveys are summarized by the ALJ at pp. 40-41 of the initial decision (J.A. 611-2).

31/ In its brief REA states (Br. 14) that air freight forwarders hold traffic for consolidation while REA dispatches air express immediately. REA neglects to state that it, too, has requested authority to consolidate air express shipments (Ex. REA-T-1, pp. 7-8).

32/ Pursuant to the provisions of the Air Express Agreement, the air carriers give priority to a "normal" amount of air express which is loaded after baggage and mail but before other cargo.

33/ Order 73-12-36, p. 16, fn. 17; J.A. 679.

today is not finding cargo capacity but filling it" (id., J.A.679).[34/] In the past, priority treatment was meaningful, not only to shippers but also to the Board. The Board stated in 1948: "Pursuant to our decision here, the only legal distinction that will exist between air express and air freight will be that air express will move under the terms specified by the air express agreements and will have space priority over air freight." Air Freight Forwarder Case, 9 C.A.B. 473, 489 fn. 20. With the passage of time, this has become a distinction without a difference.

Interestingly enough, REA itself appears of a mixed mind about the value of priority treatment. On the one hand, it argues here (Br. 14) that such priority is a valuable advantage for shippers. However, in the Rates case, "[t]he argument of REA [is] that combination aircraft belly load factors are low, and that, therefore, the air express priority has no actual relevance * * *."[35/]

Furthermore, it appears that REA's partners in air express service, the air carriers, also believe that priority has become

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34/ According to a Board study unused cargo capacity for fiscal year 1973 for all carriers in scheduled domestic service was 70.5% (Order 73-12-36, p. 16, fn. 17; J.A. 679).

35/ Initial Decision, Rates Investigation, p. 38; J.A. . Apart from the position taken in Rates case, REA managed to contradict itself within the Express case. REA Vice President Kania testified (Tr. 1318): "As I understand the current condition of the airline capacities, priority is of no significance * * * simply because the airlines are not filling the airplanes, and priority is not of significance if you have excess capacity." But on the other hand, its witness Bernard Dravis testified (Tr. 640): "It is the greatest thing we have to define air express, the priority. It is important."

a meaningless attribute. A witness for the air carriers stated (Tr. 520): "I do not think that this [priority treatment or expeditious handling] is a distinguishing feature of air express." Thus, all of the evidence on this matter -- including REA's -- clearly shows that priority treatment is now a meaningless characteristic of air express service, and supports the Board's finding in this matter.

A second claimed advantage of air express which the Board rejected is its allegedly unique broad commodity coverage.[36/] Rather, the Board found that air express carries only 18 more items than do the airlines and the larger forwarders. Moreover, REA can continue to carry such items after its transformation to air forwarder status (Order 73-12-36, p. 21, J.A. 684). Equally damaging to REA's claims of superiority is the record evidence demonstrating that the forwarders are willing to provide whatever commodity coverage air express now offers.[37/] Some forwarders have already taken steps to do so.[38/]

In examining REA's commodity coverage, the Board also rejected the contention that only air express can provide adequate carriage

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36/ In its brief (p. 13), REA equivocates in reciting its list of commodities carried, by saying that those items are "not susceptible to the consolidation savings offered by the forwarders." Having thus acknowledged that the forwarders do carry these commodities, REA retreats further by saying that the conditions of such carriage are not uniform and the shipper must locate the appropriate forwarder.

37/ See Tr. 2663-4 Ex. EAF-R-T-4, p. 8; Tr. 2342; Ex. AFFA-RT-2, p. 1. (J.A. 2002-3, 1340; J.A. 1280).

38/ Order 73-12-36, p. 22, fn. 29; J.A. 685.

for live animals. Not only do the airlines and the forwarders now provide carriage, pickup and delivery for live animals, but also REA's service for those items has recently been criticized as seriously inadequate.[39] (Order 73-12-36, p. 21; J.A. 684; Order 74-5-25, p. 5, fn. 11; J.A. 793). Thus, in this area, as in speed and priority, the record demonstrates that REA's exclusive service is a relic of the past.[40]

REA's broad geographic coverage, a factor relied upon in the past for approval of the air express system, has eroded through time. The evidence on this matter demonstrates that the geographic coverage of air express service is today virtually duplicated by the air freight forwarders. Specifically, the forwarders operate almost as many airport field offices as does REA.[41] The air carriers offer air freight service, including pick-up and delivery, to and from virtually every air carrier city, as do the forwarders. But REA lost this historic characteristic when eight air carriers declared their intention to withdraw from the air express agreement. Thus, REA's geographic coverage

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39/ In House Rept. 93-746, 93rd Cong., 1st Sess. (1973), "Problems in Air Shipment of Domestic Animals," the Committee on Government Operations concluded that animals shipped by air express often fare worse, than animals shipped by air freight.

40/ Again carriage of live animals was one type of service specifically identified by REA that would be dropped if it failed to obtain both independent rate authority and dual forwarding/express authority (Tr. 20, J.A. 2025).

41/ Emery has 66 airport field offices, Airborne has 56 and REA has 69. However, only 37 of REA's offices are operated exclusively by air express employees; the balance are operated for joint air and surface express activities (Order 73-12-36, p. 18; J.A. 681).

is being severely curtailed for this reason alone. Many markets available by air freight forwarding will be without service by air express.[42/]

Moreover, although air express was available at all points served by certificated air carriers, the airlines performed REA's ground services at 85% of those points.[43/] It is estimated that 28% of all air express shipment handlings occur at these airports (Order 73-12-36, pp. 9-10; J.A. 672-3).

In terms of total offices, REA submitted an exhibit listing 650 salaried offices and 2,695 agencies (exclusive, joint merchant,

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42/ The air carriers who have already repudiated the agreement and the effective dates of withdrawal are as follows: Delta-June 14, 1974; Southern - June 14, 1974; North Central - July 2, 1974; United - November 29, 1974; Ozark - December 26, 1974; Continental - December 28, 1974; Northwest - December 31, 1974. The following markets no longer receive direct air express service: Memphis-New Orleans; Memphis-Chicago; Memphis-St. Louis; Memphis-Miami; Memphis-Indianapolis; Atlanta-Savannah; Atlanta-Cincinnati; Atlanta-Detroit; Atlanta-Charleston, S.C.; Washington, D.C.-Columbus, Ga.; Kansas City-Sioux City. Furthermore, the carriers who have already withdrawn from the agreement serve the following number of cities with the only air service available: Delta-5; Southern-26; North Central-40. See Order 74-6-118, pp. 3-4 and appendix to the Order; S.A. 3-4. In this regard, consider the testimony of John Eichner for the airlines (Tr. 444; J.A. 1815): "Q-WELL, let us suppose that Delta's notice of withdrawal becomes effective five months from now as will happen unless something intervenes. Is that going to destroy small package shipments in America? A-No, but it is just a little like the old man and his son with the bundle of sticks, it will weaken the bundle of sticks and I suppose that if two or three or four other airlines withdraw, then it would destroy it and we would no longer have air express as we know it."

43/ This factor is also significant in the consideration of REA's demands for additional and independent authority. See infra, pp.

and branch package agencies).[44] But as the Board observed, the record reveals that 6 cities produced 56% of its total air express shipments, and 87.4% of REA's gross origin and destination (O&D) revenues came from only 6.5% of the thousands of offices it claims to have.[45] For these reasons, the Board concluded that "REA, like the direct air carriers and the air freight forwarders, does the vast bulk of its business in a relatively few large markets" (id., p. 17, J.A. 680).

Finally, the Board also examined the impact of terminating REA's air express service in terms of geographic coverage. After reviewing all of the evidence, it concluded that "few (if any) points would go unserved as a result of the termination of air express service" (id., pp. 17-18; J.A. 680-1). Apart from the

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44/ Initial Decision, Service, p. 35; J.A. 606. According to REA (Tr. 707-8, Ex. REA-103, p. 4), exclusive agents are those who devote all their time to REA; joint agents are railroad employees who also act as REA agents; merchant agents are local businessmen who devote part of their time to handling REA express, and branch package agents, also local businessmen, generally hold shipments for pick-up by local consignees.

45/ Order 73-12-36, p. 17, fn. 22; J.A. 680; see also Ex. REA-T-8-p. 4; REA 202, p. 2; REA-205; REA-212; AFFA-R-11. Another exhibit in the record sets forth Emery Air Freight's investigation of REA's claim of "2,973 communities in which REA maintains an office but the air freight forwarders do not" (Ex. REA-326). The record reveals that when Emery attempted to check the authenticity of this document by examining telephone directories or consulting the telephone information operator for each of these 2,973 points, it found that 2,030 points (more than two-thirds) did not have any local telephone listing for Railway Express, REA or air express, or else had an "enterprise" listing or a number for an office located elsewhere (J.A. 1301). Indeed, REA's

(Footnote continued)

extensive geographic coverage already provided by the air carriers and the air freight forwarders, the Board found that the forwarders have plans to expand further, replacing where necessary the air express offered by REA (id., p. 19; J.A. 682). But as the Board also noted, REA will discontinue service to a number of communities unless it improves its profitability by means of expanded authority which the Board found was contrary to the public interest (id., p. 20; J.A. 683). Thus, the Board correctly concluded that the singularly broad geographic coverage once provided by air express is no longer a hallmark of that service or a basis for continuing it.

In evaluating the existing air express service the Board acknowledged the value of REA's low rates for small-package shippers (Order 73-12-36, pp. 7, 23; J.A. 670, 686; Order 74-6-118, p. 7; S.A. 7). It was the Board's judgment, however, that this single factor did not override the other factors which collectively led to its conclusion that continuation of the service was no longer merited even if there was some acceptable way of preserving it.

REA nevertheless seizes upon its low rates (for some shipments) as a basis for urging (Br. 26) that "since any decision

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Footnote continued--

own exhibits contradict its claims of providing vital service to smaller communities (Br. 12-13). For example, although the Branch Package Agents comprise 38% of all REA offices (Ex. REA 202, p. 1), REA does not even count the volume of business handled by those offices in its exhibits (REA 204, 205, 212) because it is so small as to be inconsequential for the exhibits (see Ex. REA-T-8, p. 5 n. 1; J.A. 1683).

relating to continuation of Air Express necessarily would affect, or possibly even abolish, the rates published in current Air Express tariffs, the CAB must make the same searching inquiry as is required for any decision or action 'with respect to the determination of rates (49 U.S.C. 1482(e)).'" Thus, it contends that the Board cannot "decide the future of air express service without resort to comparative economics" (Br. 36). Without any supporting authority REA relies upon the statutory provisions relating to ratemaking, Section 1002(e) of the Act, 49 U.S.C. 1482(e). That reliance is misplaced, for that section of the Act deals with the factors the Board shall consider "in exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property ...." Here, the Board has decided under the public interest criteria of its exemption authority in Section 101(3) and its power to disapprove agreements under Section 412(b), the air express system must be terminated despite the rates that service offers. REA's attempt to overturn the Board's action on wholly inapposite grounds must be rejected.[46/]

46/ Furthermore, as the Board observed (Order 74-5-25, p. 10; J.A. 795):

> "Even apart from the Board's power to control rates, there is no basis for REA's suggestion that the rates for the new priority service will be unreasonably high. In fact, as noted

(Footnote continued)

In summary, the Board considered each attribute of service which once justified the exclusive monopoly authority REA holds for air express. In those matters where the Board reached a conclusion different from that made by the ALJ, it has carefully set forth the basis for those findings. We have shown here that the Board's findings are fully supported by the evidence of record. Hence, they are controlling. Section 1006(e) of the Federal Aviation Act of 1958, 49 U.S.C. Section 1486(e); 5 U.S.C. Section 706(e); Universal Camera Corporation v. NLRB, 340 U.S. 474, 488 (1950).

Footnote continued--

> in Order 73-12-36, it is the Board's view that competition for priority shipments among the direct air carriers and all indirect air carriers, including REA, will result in an optimum balance of price and service."

III

THE BOARD'S DETERMINATION THAT IT WAS NOT IN THE PUBLIC INTEREST TO GRANT REA THE INDEPENDENT AUTHORITY IT SOUGHT FOR AIR EXPRESS AND DUAL AUTHORITY TO PROVIDE AIR FREIGHT FORWARDING AS WELL AS AIR EXPRESS WAS REASONABLE IN ALL RESPECTS

As the Board observed, REA's desire for independent authority to set air express rates free from veto by the air carriers is based upon more than obtaining tariff flexibility (Order 73-12-36, pp. 26-27, J.A.689-90). As REA acknowledges, it seeks this authority in order to lower its current rates on large, long-haul shipments in the nation's larger markets (id., at 30; J.A.693). Whatever the inherent economics of REA's present small package air express service might be (Br. 9-10), the company recognizes that the only route to prosperity (or just survival) is to compete for the traffic now handled by the air carriers and the forwarders (Order 73-12-36, p. 27. J.A. 690).

Independent rate-making authority, the Board found, was "neither feasible nor desirable." (Order 73-12-36, p. 5, J.A. 668). It is not feasible because the air carriers, as partners to the air express agreement, have consistently opposed this change, and will not agree to it. The carriers have no intention of entering into an arrangement whereby the rates charged would reflect REA's interests and costs but not theirs as well (id., J.A. 668). Furthermore, they have no desire to lose any of their direct air cargo business to REA pursuant to an express agreement designed for that very purpose and in which they are a silent partner. As the Board recognized, this is one of the items that has stood for five years to block a new agreement (Order

74-5-25, p. 13; J.A. 798). It also found that the carriers' "position is an entirely reasonable one" (id., p. 27, J.A. 690). Furthermore, assuming Board power to require the airlines to continue its air express partnership on REA's terms, the partnership would be involuntary. This would sow the seeds for "eruptions of differences between the two sides" (id., at 24, J.A. 687), which, in turn, would obviously create undesireable service and regulatory problems. Nor is there any middle ground, for as REA admits (Tr. 870-871) if the airlines lessened their veto powers conditioned upon an air express tariff that covered their fully allocated costs with proportional revenues, the resultant rate structure would not attract the shipments which REA needs (Order 73-12-36, pp. 26-27; J.A. 689-90).

As indicated, the Board also found that independent rate authority would not be "desirable." Indeed, as its findings demonstrate, such authority would be self-defeating in terms of a continuation of air express as it has existed. It found that such authority would cause a deterioration in the traditional air express, small package market because REA's management would instead concentrate on the larger long-haul markets (Id., p. 29; J.A. 692). This is self-evident. Any possibility of survival necessarily depends on REA's ability to attract a substantial volume of shipments in the lucrative long-haul, high-density markets (id., at p. 27; J.A. 690). Inevitably, then, REA would concentrate on those markets, thereby creating a very real risk

of neglect of the traditional express markets. Cf. Southern Airways v. C.A.B., supra.[47/]

The other half of REA's prescription for financial health was dual authority, that is, authorization to operate both as an express carrier (with independent rate authority) and as an air freight forwarder. The Board, agreeing with the ALJ, found that this would be contrary to the public interest for the same reasons that have led it to reject REA's requests for such in the past. Air Freight Forwarder Case, 9 C.A.B. 473, 387-489 (1948); Railway Express, Airfreight Forwarder Application, 27 C.A.B. 500 (1958).

Dual authority would enable REA to offer services unmatched by any other indirect air carrier. Such potential to dominate the entire industry could result in diminished competition and thereby impair the vigorous development of air freight. The other factor arguing against dual authority is the potential for even higher air express rates once the cross-subsidization of the current system ceases. As the Board explained (Order 73-12-36, p. 31, J.A. 694):

> "It appears that the existing air express arrangement depends heavily upon cross-subsidization between the various air express markets. The economics of air cargo transportation are such that

47/ Moreover, as the Board noted, adoption of this proposal would confront the Board with grave difficulties as well. If REA began filing tariffs that varied by market and commodity, the Board would need sufficient economic data to enable it to pass on the reasonableness of such rates and ascertain whether those rates would not burden other traffic. That economic data is neither present nor available. As the Board said with reference to the Rates decision, (infra, pp.55-56) "the record ... is woefully inadequate, in large part because REA simply was unable to supply considerable amounts of relevant data" (Order 73-12-36, p. 29, fn. 40; J.A. 692).

> with dual authority, in many cases REA would use its air freight forwarder authority to carry traffic that is now moving by air express at a profit (typically, shipments moving in dense, heavily trafficked markets) while continuing to use its air express authority in the thin, unprofitable ones. Thus the dual authority REA seeks would reduce the extent to which the profitable air express traffic could cross-subsidize the unprofitable traffic. One result would be that shippers in small communities would have to pay higher air express rates without enjoying any compensating improvements in service.

Furthermore, this aspect of REA's prescription, the Board found, was as impractical as the other. The airlines, REA's partner in air express, have flatly and unequivocally stated that if REA obtains air freight forwarding authority they will not remain parties to the air express agreement (id., p. 32, J.A. 695). Thus, as the Board said, a grant of dual authority "would be futile" (id., J.A. 695).

In summary, the Board examined carefully the proposals submitted by REA which were identified as essential to the continuance of the present air express system. In rejecting REA's proposals, the Board weighed and balanced the various considerations, measuring public loss with public gain. This is a task committed to the specialized expertise of the Board, and should not be disturbed on review. Outagamie County Board v. C.A.B., 355 F.2d 900, (C.A. 7, 1967); Frontier Airlines v. C.A.B., 439 F.2d 634, 641 (C.A.D.C. 1971).

IV

THE BOARD WAS NOT REQUIRED TO POSTPONE ITS DECISION IN THE SERVICE CASE UNTIL IT HAD FIRST MADE A FINAL DETERMINATION OF ISSUES IN THE RATES PROCEEDING

REA also argues that the Board misplaced the order of things, and that a favorable decision in the Rates case could provide the financial sustenance necessary for its survival (Br. 50). But it ignores the Board's determination and its own earlier concessions that a favorable decision in the Rates case could not alone save REA.[48] With regard to future rates, the Board concluded that a favorable decision in the Rates case would not be enough to save REA "unless it were accompanied by extensive changes in REA's authority that would be neither feasible nor in the public interest" (Order 74-5-25, p. 16; J.A. 801).

Further, there is no basis for any assumption that a final decision in the Rates case would benefit REA. It should be noted that REA is not here arguing that the Board approve the initial

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48/ In oral argument before the Board, REA counsel declared (Oral Argument Tr. 19; J.A. 2024):

> "I find it very hard to believe that even if the Examiner's decision in the rate case were to be modified by the Board in a way that REA would regard as a more appropriate calculation of airline costs, I find it very hard to believe that it would be possible for REA to continue its present operations if it obtains nothing further in this case than what it already has, which is

(Footnote continued)

decision in the Rates case. Rather, REA's claim is that its evidence to the ALJ established an underpayment to it by the airlines of 50 million dollars. However, the ALJ rejected REA's claim and found that REA instead owed money to the air carriers.[49] Furthermore, the authority of the Board to order such readjustment remains open to question.[50] It stated (Order 74-5-23, pp. 6-8; J.A. 779-81): "while a preliminary review indicates that at least $22 million of claimed errors respecting REA costs are unsubstantiated and that most, if not all, of REA's theories pertaining to the airlines' express costs are invalid, the Board is unwilling to undertake an in-depth review of REA's contentions with respect to 1970 in the absence of, at the least, more data for the remaining years which would be involved, and prior to resolving our heretofore stated reservations concerning jurisdiction." Thus, the Board's directive

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Footnote continued--

essentially what Examiner Keith has given us." REA's President testified earlier in an identical fashion (Tr. 920; J.A. 1841):

> Q * * * In other words, aside from those, whatever the Board's decision in the rate case is, you would still -- REA that is, would still want some changes in the agreement, isn't that correct?
>
> A. That's right.

49/ In the Rates initial decision, the ALJ did not order REA to reimburse the air carriers because the carriers contend the Board is without authority to consider the subject, and therefore they would not accept any payment.

50/ The claim that the Board lacks jurisdiction to pass upon retroactive adjustment of the divisions is based upon the contention

(Footnote continued)

to remit the parties to negotiation over readjustment of past divisions was a reasonable method of disposing of this issue. 51/

Furthermore, the Board stated that it was not in any position to decide the Rates issues because "the record in that case is woefully inadequate" (Order 73-12-36, p. 29; J.A. 692). The hearings there resulted in a "morass of seemingly conflicting figures" and an "Odyssey of cost accounting" attributable in large part to REA (Order 74-5-23, p. 6; J.A. 779 ; Order 73-12-36, p. 29; J.A. 692). REA's financial data was virtually indecipherable. It frequently revised and recast its exhibits to reflect not only altered conclusions but also changes in the underlying fundamental statistics. Moreover, it declined to comply with the ALJ's directive to provide monthly reports of traffic data (Order 74-5-23, p. 6; J.A. 779). Nevertheless, REA now urges this Court to overturn the Board's order on the grounds that the Board initially has declined to enter the statistical puzzle-palace REA had erected.

Footnote continued--

that express rates are not "joint rates" and therefore do not come within the purview of the Board's authority under Section 1002(h) of the Act, 49 U.S.C. 1482(h).

51/ REA alleges that such informal conferences violate the holding of Moss v. CAB, 430 F.2d 891 (C.A.D.C., 1970) regarding ex parte resolution of rates issues. The conferences in question, however, involves only a determination of whether, and how, to allocate revenues already on hand from rates already charged, and has neither a prospective impact nor an effect on the amount of the rate itself. Moreover, the reason for the conference was the failure of the parties to adequately present the factual data and legal views necessary for resolution of the division-related issues.

V

THE BOARD WAS NOT REQUIRED TO POSTPONE THE EFFECTIVENESS OF THE SERVICE INVESTIGATION DECISION UNTIL THE AIRLINES HAD INSTITUTED A NEW HIGH-PRIORITY SERVICE, NOR DID IT ERR IN EXCLUDING REA FROM THE AIRLINES' DISCUSSIONS ON THAT MATTER

The next assault upon the Board's decision is that the Board was not at liberty to terminate air express until a replacement service had been instituted. Additionally, REA asserts that its exclusion from the airlines' discussions deprives it of its rights under Ashbacker [52/] to comparative consideration for authority to provide that service. Both contentions rest on a misconception of the Board's order regarding the nature of this new high-priority service.

First, as the Board found (Order 74-5-25, p. 4; J.A. 789), air express fills the need for priority service no better than the existing service of air freight forwarders. Furthermore, the new service envisioned by the Board would not be a mere replacement service for air express "for the reason that even with such priority rights, air express is not particularly fast" (Order 74-5-25, p. 4; J.A. 789). To the contrary, the high priority service the Board contemplated is a new service, designed to offer shippers that which neither the air carriers, the forwarders or air express have provided: truly fast, next flight out, airport-to-airport transportation. [53/]

52/ Ashbacker Radio Co. v. FCC, 326 U.S. 327 (1945).

53/ It is to be noted in this connection that the Board found that the "extra-quick service" it had in mind "would be valuable to * * * a relatively small number of shippers (Order 74-5-25, p. 4 , J.A. 789).

In all of these circumstances, temporary continuation of air express pending inauguration of the new and superior service would not have filled any gap in service. Plainly, then, the Board's refusal to provide for such continuation was entirely reasonable.

Such misapprehension about the nature of the new high-priority service also leads REA to an attack the Board's orders relating to the establishment of that service[54/] on Ashbacker grounds. As the Board stated in rejecting REA's contention that it was deprived a comparative hearing and impermissibly excluded from airline discussions (Order 74-6-118, p. 6; S.A. 6):

> "In our view, the gravamen of REA's Ashbacker contention is not that the Board denied it a comparative hearing on this matter, but that, after hearing, the Board rejected REA's proposal. Furthermore, the airline discussions, to which REA repeatedly refers, have nothing to do with Ashbacker. They merely represent an effort on the part of the airlines to implement the Board's determination in the Service Investigation placing the airlines under an obligation to offer shippers an extra-fast airport-to-airport service."

Obviously, REA is free to suggest to the airlines that it is available to provide any ancillary ground support which this new service may require. REA is not, however, entitled to assume that its suggestions must be accepted or that it may, as a matter of right, attend the airlines' discussions regarding the need for such ancillary support from it or anyone else.

54/ Order 74-2-118, J.A. 744; Order 74-4-1, J.A. 763 ; Order 74-5-75, J.A. 813.

VI

THE PRESENT AIR EXPRESS SYSTEM OPERATES AS AN IMPEDIMENT TO ADEQUATE SMALL PACKAGE SERVICE, AND THE BOARD DID NOT ERR IN REQUIRING THAT IT BE TERMINATED

We have already shown that air express is no longer unique and irreplaceable, and that the features which once merited its retention as a separate service have become tarnished. Further disintegration of air express service is now likely, as REA admits, by reason of the fact that the public interest would not permit granting the additional authority necessary for financial rehabilitation. In spite of this, REA argued that the Board could not take affirmative action to terminate air express, and should have merely permitted it to continue (presumably until it died a natural death).

However, there are affirmative public interest considerations which require the termination of the present air express arrangement.[55/] In the first place, the air express arrangement has been beset by considerable difficulties. The parties have been unable to reach any new substantive agreement for this service for a number of years. Those airlines still party to the agreement, while amenable to preserving air express pendente lite, have conditioned such consent to their right to immediately terminate all participation in the agreement if REA should default in any of its payments to them. "Moreover, although REA might somehow muddle through for a while, it would only be postponing the inevitable collapse" (Order 73-12-36, p. 7, J.A. 670).

55/ We again note that the Board's order only terminates the REA-airlines air express arrangement and provides REA with new authority. It does not terminate REA as an operating entity.

Thus, the Board found that the public interest requires a small package service which is not "in chronic danger of sudden danger of sudden suspension" (id., J.A. 670). Secondly, the Board determined that the REA monopoly stands in the way of the establishment of a truly dependable small package service, and that the time has come to lay a solid groundwork for such service. The Board explained that such dependable service

> "... is not possible so long as REA's express service continues to exist. For, while REA continues its monopoly, and offers its low rates, air freight forwarders cannot economically afford to expand into REA's special markets and offer competitive small-package service. Once air express markets are opened to all, including REA, small-package shippers will have the chance to gain the benefit of a truly dependable service. And they will be released from the constant threat that the only available service will suddenly disappear." (Order 73-12-36, p. 8; J.A. 671).

Moreover, it is obvious that the present air express arrangement serves to some degree to inhibit the participating airlines from extending their full efforts to develop and provide dependable small package services. Under the present arrangement, assuming REA would be able to survive, a participating airline has less incentive to develop an independent service that it otherwise would have since it is assured of some degree of participation in the air express arrangement.

Additionally, the Board found that "promising substitutes for the joint REA-airlines air express arrangement now exist in profusion" (Order 73-12-36, p. 33; J.A. 696). The record shows that the air freight forwarders stand prepared to offer service with increased

commodity and geographic coverage (id., pp. 18-19, 21-22; J.A.681-2,684-5).[56/]

In sum, termination of the air express arrangement, in the long run, will best serve everyone. As the Board stated (id; p. 8 J.A. 671):

> "Once the express monopoly ends, both airlines and freight forwarders (including REA) will be encourage to fill any service voids, and to achieve as a result of competition, a more optimum balance of price and service." (footnote omitted)

56/ For example, forwarders are prepared to offer expanded security services for express-type transportation of currency, coin, gold and silver bullion, jewels, securities and other valuables (id., p. 22 fn. 29; J.A. 685). They also intend to convert destination agencies to serve as traffic generating points "in order that there can be a continuation of the same type, scope, commodity and points of service as is presently contained in REA's express activities" (id., p. 19, fn. 26; J.A. 682).

VII

THE BOARD WAS NOT OBLIGATED TO IMPOSE LABOR PROTECTIVE PROVISIONS FOR THE MEMBERS OF BRAC WHEN IT AWARDED AIR FREIGHT FORWARDING AUTHORITY TO REA

The Brotherhood of Railway and Airline Clerks (BRAC) argues (Br. 3) that in deciding the Service Investigation the "CAB gave no consideration to providing suitable labor protective provisions as it could and should have done." The reason is simple enough--BRAC never suggested to the Board that it should impose such conditions. For the same reason, the issue is not open for judicial consideration, since Section 1006(e) of the Act (49 U.S.C. 1486(e)) provides that "no objection to an order of the Board * * * shall be considered by the [reviewing] court unless such objection shall have been urged before the Board * * *."[57/] Thus, "as a technical matter," the court lacks jurisdiction to consider the contention. Air Line Pilots Ass'n v. C.A.B., ___F.2d ___ (C.A.D.C. No. 73-1214, decided August 8). Moreover, the Court there stated, "as a practical matter, we cannot exercise an appellate function in the review of administrative matters unless the problems have been fully aired and focused in the proceedings below" (id., p. 7).

57/ In its motion for stay (p. 21), REA did make a passing reference to the alleged adverse impact of the Board's decision on REA employees, but it did not urge imposition of labor protective conditions. Rather, it relied on the alleged impact as a reason for continuation of REA as an air express carrier.

Wholly apart from that obstacle to consideration of the BRAC contention, it is clear that the Board fully complied with its duty to consider employee welfare. As the District of Columbia Circuit has said, "the welfare of displaced employees is a legitimate factor in the public interest." Air Line Pilots Ass'n v. C.A.B., 475 F.2d 900, 905, (1973). The Board did consider this factor in making its public interest balance in this case, finding that REA's best chance for continued viability lay in air freight forwarding. This, it said, would benefit "REA's employees, customers, creditors and any others who may be dependent upon REA's continued existence" (Order 74-6-118, p. 4; J.A.). Both REA and BRAC speak of the Board's orders as having a fatal effect on REA's corporate existence. But as the Board has repeatedly declared, its decision is intended to save REA if it can be saved, and not to kill it (Order 73-12-36, pp. 33-35; J.A.695-8 ; Order 74-5-25, pp. 17-18; J.A.802-3; Order 74-6-118, pp. 2, 4; S .A. 2,4 . It said (Order 73-12-36, pp. 34-35; J.A.697-8):

> "But its reformation into an air freight forwarder will have numerous advantages for it, as its management recognized. It will be able to limit its business to the kinds of traffic, in the areas of the country, it can deal with most effectively. Its rate policies will no longer have to take into account airlines partners whose interests vary so greatly from REA's. And the size, identity, and breadth of coverage it developed as the airlines' ground agent for air express should stand it in good stead in its efforts to compete with other forwarders on equal terms."

While general employee welfare must be — and was -- weighed in the broad public interest equation, the general welfare of employees would not have been sufficient to warrant imposition of labor protective conditions even if the Board had been asked to impose them. The public interest which warrants imposition of labor protective provisions is "not broadly one of general employee welfare." Kent v. C.A.B., 204 F.2d 263, 265 (C.A. 2, 1953), cert. denied, 346 U.S. 826. Rather, the justification for the imposition of such provisions is the public interest in "obtain[ing] the degree of stability in air transportation that freedom from industrial strife will provide" (id.). Accord: U.S. v. Lowden, 308 U.S. 225, 238 (1939); Air Line Pilots Ass'n v. C.A.B., ___ F.2d ___ (C.A.D.C. No. 73-1068, decided March 20, 1974).

In recognition of these holdings, the Board has ruled that the question presented when imposition of labor protective conditions is under consideration is

> "whether there is a particularized public interest which calls for or warrants special provision for employees in the form of affirmative, government-imposed protection (not enjoyed by the vast majority of the national labor force) against the risk of adverse consequences of the employers' business decisions and transactions.
>
> * * *
>
> "General considerations of equity and employee welfare, while a relevant public interest factor, may not, without more, serve as the justification for labor protective conditions. Rather, the Board's view has been that it must be able to relate an employee protective condition to the furtherance of stability and efficiency of

> operation in terms of the ongoing relationship between a carrier and its labor force, not merely to the benefit of the employees as such."58/

Rather obviously, we think, this case involved no such "particularized public interest."

CONCLUSION

For the foregoing reasons, the Board's Orders should be affirmed.

Respectfully submitted,

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Dated: September 3, 1974

58/ Order 73-2-60 (February 14, 1973, emphasis added).

APPENDIX

A-1

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301, et seq.:

TITLE I -- GENERAL PROVISIONS

DEFINITIONS

Sec. 101. [72 Stat. 737 as amended by 75 Stat. 467, 76 Stat. 143, 82 Stat. 867, 84 Stat. 921, 49 U.S.C. 1301] * * * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

* * * * *

DECLARATION OF POLICY: THE BOARD

Sec. 102. [72 Stat. 740, 49 U.S.C. 1302] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * * * *

TITLE IV -- AIR CARRIER ECONOMIC REGULATION

* * * * *

TARIFFS OF AIR CARRIERS

Filing of Tariffs Required

Sec. 403 [72 Stat. 758, as amended by 74 Stat. 445, 49 U.S.C. 1373] (a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

* * * * *

Filing of Divisions of Rates and Charges Required

(d) Every air carrier or foreign air carrier shall keep currently on file with the Board, if the Board so requires, the established divisions of all joint rates, fares, and charges for air transportation in which such air carrier or foreign air carrier participates.

RATES FOR CARRIAGE OF PERSONS AND PROPERTY

Carrier's Duty to Provide Service, Rates, and Divisions

Sec. 404. [72 Stat. 760, 49 U.S.C. 1374] (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

* * * * *

POOLING AND OTHER AGREEMENTS

Filing of Agreements Required

Sec. 412. [72 Stat. 770, 49 U.S.C. 1382] (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

Approval by Board

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any

modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

* * * * *

TITLE X -- PROCEDURE

* * * * *

COMPLAINTS TO AND INVESTIGATIONS BY THE SECRETARY OF TRANSPORTATION AND THE BOARD

Sec. 1002. [72 Stat. 788, 49 U.S.C. 1482] * * * * *

Power to Prescribe Rates and Practices of Air Carriers

(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: Provided, That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge.

Rule of Ratemaking

(e) In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors--

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons ans property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

* * * * *

Sec. 1006. [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486] * * * * *

Findings of Fact Conclusive

(e) The findings of facts by the Board or Secretary of Transportation, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Secretary of Transportation shall be considered by the court unless such objection shall have been urged before the Board or Secretary of Transportation or if it was not so urged, unless there were reasonable grounds for failure to do so.

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 26th day of June, 1974

EXPRESS SERVICE INVESTIGATION	Docket 22388

ORDER DENYING MOTION FOR STAY
OF ORDERS 73-12-36 AND 74-5-25

In our Opinion 1/ and Supplemental Opinion 2/ in this proceeding we concluded that (1) as a practical matter air express in anything resembling its present form cannot long survive; (2) any attempt by the Board to change the airline-REA air express relationship in order to restore the air express system, and REA, to viability would not work and in any case would not be in the public interest; and (3) because of the vast changes in the air cargo industry since the birth of air express, termination of the arrangement will not deprive the public of any unique benefits (even assuming that Board action could prevent the demise of air express). Accordingly, we granted REA nationwide air freight forwarder authority and provided that the air express system, and REA's authority as the air express ground agent, would end upon the commencement by REA of air freight forwarder operations, but in no event later than July 31, 1974.

REA now asks that we stay the effective date of our Orders pending judicial review. 3/ REA claims that the likelihood is that our decision will be reversed, and that a stay is necessary to prevent irreparable injury to the public interest, to REA's customers and creditors, to REA employees and to REA itself.

The Pet Industry Parties have filed an answer in support of REA's motion for stay. Emery Air Freight Corporation, the Air Freight Forwarders Association and United Air Lines have filed answers in opposition to the stay. A pleading by the Participating Airlines appears to indicate that 24 of the airlines presently participating in the air express arrangement favor grant of the

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1/ Order 73-12-36.
2/ Order 74-5-25.
3/ Although REA in terms has requested in Docket 22388 only a stay of Order 74-5-25, we shall treat its motion as encompassing as well a request to stay our decision in Order 73-12-36. REA also asks that we stay the effectiveness of our order in the Investigation of Air Express Rates case, Order 74-5-23. We deal with that aspect of REA's motion in a separate order.

stay, while several others (in addition to United) do not. Finally, REA has filed a reply to the answers of Emery and the Air Freight Forwarders Association. 4/

We have decided not to grant the stay sought by REA because it is our judgment that delaying the implementation of our decision will work to the advantage of neither the public interest nor REA.

We turn first to REA's contention that our decision, if not stayed, will result in REA's demise.

To begin with, we cannot accept REA's claim that although it is in sufficiently good economic shape to remain viable if our decision in this proceeding is stayed, it nevertheless cannot make a changeover to air freight forwarder operations, and that the implementation of our requirement that it make the change would mean the end of REA.

In our view the facts at hand show that REA's chances of staying alive are better as an air freight forwarder than as ground agent for air express, and that the probability of REA being able to make the switch is higher if it does so now than if it waits. Indeed, REA's request for a stay seems more of an expression of REA's reluctance to break with the past than an assessment of the precarious realities REA faces.

It is by no means clear that REA is in fact unable to make the shift to air freight forwarder. REA has long sought forwarding authority. REA's chief executive officer has stated that absent major modifications of the airlines-REA relationship -- which modifications we found infeasible and contrary to the public interest -- REA "would be better off as an air freight forwarder." It has its long-standing customers and a staff fully familiar with the air cargo business. And REA has yet to explain why its existing equipment and facilities are not suitable for air freight forwarder operations. We discussed these same matters in our Supplemental Opinion, 6/ and there noted that REA's contentions that it could not promptly make the switch to air freight forwarder were without factual support. Notwithstanding this invitation for hard evidence, REA's contentions on this point in its motion for stay are made without factual support other than references to its ongoing financial difficulties. But as we now discuss, to whatever extent that REA's financial problems indicate that the company may be too weak to shift to forwarder operations, there is considerably greater evidence that REA faces an imminent end if it does not change.

In our Opinion in this proceeding we referred to the deterioration of REA's financial position noting, among other things, that in the seven years ended December 1972 REA lost about 68 million dollars, and that its liabilities far exceed its assets. Things have not gotten any better for REA. It lost

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4/ We will grant REA's motion to file this otherwise unauthorized document.

5/ Hearing Tr. at 920.

6/ At p. 17.

$8,500,000 in 1973 and has been losing money at just as fast a pace this year: REA's operating losses during the first quarter of 1974 were $1,686,000, slightly more than its losses in the same period in 1973.7/ The continuation of severe losses this year comes despite sharp increases in air express rates and the percentage of air express revenues going to REA. A major part of the problem seems to be a very substantial decline in shipments compared to last year. (For instance, REA advises that April air express shipments were down 16 percent.)8/

REA states that a further rate increase will return it to profitability. However REA has made the same claim with respect to several recent rate increase filings and they have been shown to have been erroneous. Moreover the assumptions upon which REA's forecast is based are badly in error, including traffic predictions that are overstated 9/ and overly optimistic cost projections. The fact is that REA's financial position, if it continues to operate as air express ground agent, is soon going to be untenable. Even if REA's losses were to continue at only their present pace, the increasing gap between REA's liabilities and cash needs, on the one hand, and its assets and revenues, on the other, spell imminent disaster. Thus even REA's supporters among the airlines state that if the Board were to grant a stay in this proceeding, our order should "provide expressly . . . that it shall be without prejudice to the right of the airlines . . . to terminate air express service forthwith in the event REA should default in any payment due the airlines thereunder."10/

Furthermore, REA's contentions about its continued viability as air express ground agent rest on the assumption that the air express system, upon which REA is at present almost wholly dependent, can continue on as is for at least the period in which the court has our decision under review. But the facts have already shown that assumption to be in error. On June 14 Delta Air Lines and Southern Airlines stopped handling air express shipments and thus air express ceased being a service of all the domestic carriers. (Such action was in accordance with tariff

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7/ REA nonetheless states that it "made a $400,000 profit in March and it appears that it also made a substantial profit in April." (Motion for Stay at p. 23.) However REA provides no backup figures at all for that statement. Moreover, the statement is difficult to accept at face value since it is so inconsistent with the data and projections included in REA's most recent tariff filing. Even assuming the accuracy of the statement, however, it suggests only that REA may have enjoyed a brief and not to be repeated respite from its saga of endless losses. If there has been such a respite, and if it is to be given any significance at all, it suggests only that because REA's cash drain was stopped for at least a brief period its chances of shifting to air freight forwarder operation are somewhat better than might otherwise be expected.

8/ Traffic and financial figures are from REA's recent tariff filing. REA has asked that those figures be incorporated by reference into its pleadings on the motion for stay. See affidavit of REA's Vice President-Finance attached to REA's Reply.

9/ Thus REA assumes that the rate increase will have no effect on traffic volume (i.e., perfect inelasticity of demand). Such an assumption is on its face an erroneous one. Moreover REA's own evidence in the proceeding makes the point that the demand for air express service is significantly elastic: See, Statement of Witness Nelson at 11.

10/ Answer of Participating Airlines to Motion of REA Express Inc., for Stay, at 5.

filings by the two airlines. REA filed no objection to those tariff changes.) North Central and Northwest are next, with their air express service due to stop on July 2 and July 31, respectively. And United -- the nation's largest carrier -- has unequivocally stated that it will terminate its connection with air express in November, which is as soon as the notification requirements of the air express agreements permit. 11/ The effect of these carrier actions is to entirely preclude some shipments from moving by air express (but not by air freight) and in many other cases to greatly add to REA's difficulties and to consumer dissatisfaction with air express. Delta and Southern alone, after all, provide the only direct service in a number of significant markets, and a major part of the capacity in others.

In light of all of the foregoing considerations, we cannot conclude that a failure to stay our decisions in this proceeding will do irreparable injury to REA: A stay will not save REA, and a prompt shift from express ground agent to air freight forwarder is more likely to help REA than to hurt it. There is no guarantee, of course, that REA will be able to avoid demise by switching to air freight forwarder operations. But in our judgment its chances for life are considerably greater as a forwarder than as air express ground agent; and as discussed above the sooner the shift is made the more likely its chances of success.

The claims of irreparable injury to REA's employees, customers and creditors rest upon REA's statements that it would be able to continue in existence if the Board's decision is stayed, but that it will have to stop if the Board's order becomes effective. As stated above, we disagree with both lines of that argument. If we are correct in our view that REA's best chance for continued viability is to shift promptly to air freight forwarder operations, a grant of REA's motion for stay would do more harm than good for REA's employees, customers, 12/ creditors, and any others who may be dependent upon REA's continued existence.

Similar considerations also apply in respect to the public generally. The very purpose of this proceeding was to determine what Board action would be most in the public interest in respect to the indirect air carrier authority of REA express and the related agreements between the various

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11/ The agreements provide for a six-month notice-of-termination period. United gave its notice on May 22, 1974. The Board is advised that Piedmont presented its notice of termination shortly after United did, thus enabling it to withdraw from air express service on November 29. A listing of points served only by Delta, North Central, Northwest and Southern, and some major markets served by those carriers, is attached as an appendix.

12/ In this context we include REA's surface and international air freight forwarder customers as well as air express shippers.

airlines and REA. We concluded that the nation's shippers will be better served when air express is ended, and that prompt termination of REA's express ground agent authority and the air express agreements is in order. We remain of that view. In respect to REA's motion for stay, since a stay will not preserve REA's existence as express ground agent, and since a prompt shift by REA to air freight forwarder operations offers REA the best chance of continued viability, we believe that the interests of the public, as well as those of REA, would be disserved by a grant of REA's motion for stay.

We turn now to REA's argument that our decision is unsupportable and that REA will succeed in obtaining a reversal of the Board's decision on review.

Ultimate determination of whether the Board's actions in this proceeding were a proper exercise of its responsibilities will, of course, be for the courts to decide. However, as we view the matter, there has been no showing that our decision in this proceeding is likely to be overturned on review.

At the outset we note that REA argues that the Board's decision is legally deficient in that it failed to consider the Administrative Law Judge's initial decision and shipper testimony, presumably because the conclusions reached in such decision and testimony differed from those reached by the Board. The Board thoroughly considered the Judge's findings and conclusions, together with the record, as witnessed by the numerous references in our Opinions thereto.

REA again contends that the Board could not validly terminate the present air express arrangement until a substitute has been effected, and that the Board erred in not consolidating the airline discussions in Docket 26238 13/ with this proceeding. However, we have discussed elsewhere why we concluded that awaiting the further development of alternatives to air express services is infeasible and not in the public interest: See, for example, Supplemental Opinion at pp. 8 and 10. Similarly, REA's contentions with respect to the Board's alleged error in not consolidating the airline discussion in Docket 26238 with this proceeding have been previously raised by REA, and rejected by the Board.14/

13/ In the Matter of the Petition of the Airlines Participating in Air Express Service for authorization of inter-carrier discussions concerning the creation of an industry-wide priority cargo service.
14/ See Orders 74-2-118, February 27, 1974, 74-4-1, April 1, 1974, and 74-5-74, May 14, 1974.

REA also contends that the Ashbacker principle requires that the Board give comparative consideration to REA's current air express service and the priority service that the airlines must provide since the services are mutually exclusive. REA maintains that the Board's failure to do so, and the Board's failure to include REA as a party to the air carrier discussions, supra, have deprived REA of procedural due process and amount to an unconstitutional taking of its property.15/ The Board cannot acquiesce in these contentions. In our view, REA has been accorded every procedural right. The Express Service Investigation was a most comprehensive evidentiary proceeding, in which the Board considered various forms of "express" service, including REA's, and in which REA was provided with every opportunity to present its case. In our view, the gravamen of REA's Ashbacker contention is not that the Board denied it a comparative hearing on this matter, but that, after hearing, the Board rejected REA's proposal. Furthermore, the airline discussions, to which REA repeatedly refers, have nothing to do with Ashbacker. They merely represent an effort on the part of the airlines to implement the Board's determination in the Service Investigation placing the airlines under an obligation to offer shippers an extra-fast airport-to-airport service. In any event, and as we have repeatedly said in our previous Opinions16/, the Board's decision does not in any way exclude REA from an equal and virtually unlimited participation in the air freight market with other indirect air carriers. In fact, as an air freight forwarder, REA will be able to offer whatever services it now offers as the air express ground agent. Finally, REA's contentions regarding the Board's failure to include REA as a party to the airlines' discussions have been previously raised by REA, and have also been rejected by the Board.17/

REA also argues that our decision will be overturned as based on speculation rather than fact. REA insists that we are precluded as a matter of law from ending our approvals of the air express agreements until we have passed upon air express rate levels and REA-airline division arrangements in the Investigation of Air Express Rates case. As discussed in our Supplemental Opinion, however, these arguments miss the point. The facts are clear, and indeed are not even seriously in dispute, that

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15/ In a similar vein, REA contends that the presence of Board observers at the airline discussions prejudices its rights by exposing the Board to the ex parte views of the airlines. We perceive no prejudice. Moreover, the presence of observers is desirable in the public interest to ensure that the discussions are conducted within the guidelines established by the Board.

16/ See, e.g. Order 73-12-36, pp. 8, 20-21, 38 and, Order 74-5-25, pp. 5 and 8.

17/ See, note 14, supra.

the air express system in its historic form cannot continue. Thus a break with the past is inevitable. In these circumstances prediction of the likely effects of at least partially untested ways of providing service to the public -- or what REA calls "speculation" -- becomes unavoidable; and we reject REA's thesis that we are legally precluded from acting on our judgment of what the future is likely to bring.

In respect to REA's insistence that we should have delayed acting in this proceeding until all issues in the Rates case were finally resolved, our Opinion and Supplemental Opinion discuss why that would have been futile. As we have said before, the low rates available under air express tariffs for some kinds of shipments are a strong consideration favoring the continuation of air express. But we previously concluded on the basis of the record then before us that air express could not be continued, and, as pointed out above, this conclusion has by no means been disproved by recent events. Thus awaiting the outcome of the Rates case would have served no purpose (even assuming that the record in the Rates case would have enabled us to establish an appropriate express rate level notwithstanding REA's apparent inability to provide meaningful cost data). The same is true in respect to the revenue division aspects of the Rates case, particularly since we concluded, and as REA has argued,18/ that a change in divisions would not be enough to return the air express system to health.

18/ See, e.g., Oral Argument Tr. at 19; (per counsel for REA) "I find it very hard to believe that even if the Examiner's decision in the rate case were to be modified by the Board in a way that REA would regard as a more appropriate calculation of airlines costs, I find it very hard to believe that it would be possible for REA to continue its present operations if it obtains nothing further from this case than what it already has, which is essentially what Examiner Keith has given us."

Lastly, REA's motion for a stay urges that the Board's decision in this proceeding amounts to a "major federal action significantly affecting the quality of the human environment" and therefore an environmental impact statement is required by Section 102(2)(c) of the National Environmental Policy Act. In making this assertion for the first time, REA offers nothing to support its claim that the Board's action will significantly affect the quality of the human environment. We have examined the matter and find REA's allegation without merit.

To establish our obligations under Section 102(2)(c) of the Act, we must measure the effect of our action upon the quality of the human environment, mindful that the word "significantly" in that section establishes a threshold of importance or impact that must be met before a statement is required. This action has no significant consequences.

As an air freight forwarder, REA will operate the same trucks it now uses to provide air express service. The same REA vehicles which once provided air express service will now provide air freight forwarding service, or the service will be provided by another air freight forwarding operator (Op. 18-19). REA asserts that the Board's order would result in the operation of additional vehicles which would add congestion at airports. However, there is no reason to believe that this result would occur, and, if it did, that it would have any significant environmental consequences.

To summarize, we find nothing in the record or any other basis for believing that our action (1) will cause adverse environmental effects in excess of those created by existing uses in the affected areas or (2) has an absolute quantitative adverse environmental effect, including any cumulative harm resulting from a contribution to existing adverse conditions or uses in the affected areas. Undoubtedly, there are a number of actions which the Board may take which will require preparation of environmental impact statements. We clearly understand our continuing duty under the Act to carry out its purposes and policies to the fullest extent possible. That obligation, however, does not require the preparation of an impact statement where, as here, we find that the effect of our action is environmentally insignificant.

ACCORDINGLY, IT IS ORDERED THAT:

1. The motion of REA Express Inc., for leave to file an unauthorized document, dated June 11, 1974, be and it hereby is granted; and

2. The motion of REA Express Inc., for stay of Orders 73-12-36 and 74-5-25 be and it hereby is denied.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND

Secretary

(SEAL)

TABLE I

Examples of Markets in which Delta, North Central, Northwest, or Southern provide the only direct service

Columbus, Ga.-Washington, D. C.	(SO)
Memphis-New Orleans	(DL, SO)
Memphis-Chicago	(DL, SO)
Memphis-St. Louis	(DL, SO)
Memphis-Miami	(DL)
Memphis-Indianapolis	(DL)
Minneapolis/St. Paul-Portland	(NW)
Minneapolis/St. Paul-Spokane	(NW)
Atlanta-Savannah	(DL)
Atlanta-Cincinnati	(DL)
Atlanta-Detroit	(DL)
Atlanta-Charleston, S. C.	(DL)
Kansas City-Sioux City	(NC)

TABLE II
Page 2 of 4 pages

Examples of Top REA Markets in which Delta, North Central, Northwest, and/or Southern Provide at least Half of the Daily Direct Frequencies

Market	Delta	North Central	Northwest	Southern
Chicago-Minneapolis-St. Paul			X	
Chicago-New Orleans	X			X
Chicago-Cincinnati	X			
Chicago-Louisville	X			
Chicago-Atlanta	X		X	X
Chicago-Miami	X		X	
New York City-Minneapolis-St. Paul		X	X	
Cleveland-Detroit	X	X	X	
Indianapolis-Detroit	X			

NOTE: Each of the above markets is one of REA's top 100 markets: See Exh. REA 209.

Table III

Monopoly points: Delta, North Central, Northwest, and Southern *

1. Delta

Manchester, NH

Brunswick, GA

Bangor ME

Portland, ME

Presque Isle, ME

2. Northwest

Fargo, ND (with North Central)

Jamestown, ND

Grand Forks, ND (with North Central)

3. Southern

Anniston, AL

Decatur, AL

Dothan, AL
Florence, NC
Gadsden, AL

Mobile, AL

Tuscaloosa, AL

Elgin Air Force Base, FL

Albany, GA

Athens, GA

Moultrie--Thomasville, GA

Valdosta, GA

Columbus, MS

Greenville, MS

Greenwood, MS

Gulfport/Biloxi, MS

Hattiesburg, MS

Laurel, MS

Natchez, MS

Tupelo, MS

University/Oxford, MS

Anderson, SC

Greenwood, SC

Jackson, TN

Shelbyville/Tullahoma, TN

Meridian, MS (with Delta)

* Table III does not reflect points at which these carriers are now suspended or points in issue in the New England Service Investigation.

Table III (continued)

Monopoly points: Delta, North Central, Northwest, and Southern

4. North Central

Alpena, Mich.
Benton Harbor/St. Jos., Mich.
Escanaba, Mich.
Hancock/Houghton, Mich.
Ironwood/Ashland, Mich.
Iron Mountain/Kingsford, Mich.
Manistee/Ludington, Mich.
Kalamazoo/Battle Creek, Mich.
Marquette, Mich.
Marinette/Menominee, Mich.
Pellston, Mich.
Saulte Ste. Marie, Mich.
Traverse City, Mich.
Bemidji, Minn.
Brainerd, Minn.
Chisholm/Hibbing, Minn.
Duluth/Superior Minn.
International Falls, Minn.
Fairmont, Minn.
Mankato, Minn.
Thief River Falls, Minn.
Winona, Minn.
Worthington, Minn.
Norfolk, Neb.
Devils Lake, N.D.
Fargo/Moorehead, N.D. (Fargo with NWA)

Aberdeen, S. D.
Brookings, S.D.
Huron, S.D.
Mitchell, S.D.
Watertown, S.D.
Yankton, S.D.
Beloit/Janesville, Wis.
Eau Claire, Wis.
Green Bay/Clintonville, Wis.
La Crosse, Wis.
Manitowoc/Sheboygan, Wis.
Oshkosh/Appleton, Wis.
Rhinelander/Land O'Lakes, Wis.
Wausau/Stevens Point, Wis.
Rapids/Marshfield, Wis.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REA EXPRESS, INC., Petitioner,	:	
v.	:	No. 74-1611
CIVIL AERONAUTICS BOARD, Respondent.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this date served Respondent's printed Brief upon the following persons:

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